## Firman bin Fani v Public Prosecutor

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COURT OF APPEAL (KOTA KINABALU) — CRIMINAL APPEAL NO S-05–260–09 OF 2011
ABDUL AZIZ AB RAHIM, ROHANA YUSUF AND ABANG ISKANDAR JJCA
23 JULY 2014

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*Criminal Law — Murder — Conviction and death sentence — Appeal — Evaluation of evidence at end of prosecution case — Whether trial judge failed to undertake maximum evaluation of evidence — Whether offence committed in furtherance of common intention established — Whether trial judge properly evaluated evidence of accused at end of defence case — Whether trial judge considered all aspects of defence evidence — Infirmities of a serious nature surrounding decision of trial judge — Whether conviction unsafe — Whether warranted appellate intervention — Penal Code s 302*

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*Criminal Procedure — Charge — Amendment of — Common intention — Finding on common intention — Whether trial judge failed to make a finding — Whether amounted to misdirection occasioning miscarriage of justice — Whether common intention established*

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On the day of the murder, Florian Fredoline ('PW18'), the accused, and Topan bin Labala ('Gondrong') ('PW8') had gone looking for Oliver Newton Sibatan ('PW17') at his house, but Oliver was not at home, so they stopped by at Dangau @ John bin Mosunggil's ('PW7') house, Oliver's neighbour. The four of them then drank 'talak', before Oliver and Joy joined them, an hour later. At this time, John left as he felt drunk. After John went inside his house, Benny ('the deceased') came and they continued to drink the 'mentakuk'. Joy was sitting next to Benny, when suddenly his cigarette fire accidently struck Benny's elbow. He got angry and started shouting. Joy suddenly stood up and pushed Benny's face and punched his head. After calming down Joy, Florian brought Joy inside John's house leaving Benny with the accused. Benny then continued asking the accused questions that made him angry but he was calmed down by Oliver. At this time, Oliver allegedly told SP18 that he saw a knife tucked at the accused's waist. When the drinking session was over late that night, they all proceeded to go home. Not far after leaving John's house, Florian and Oliver heard Benny's voice screaming, calling for Florian and he also shouted the accused's name. Florian then saw Joy hitting Benny's head and the accused facing the deceased holding something shining in his hand. Florian said that he also saw the accused stabbing the deceased by using the shiny weapon in his hand. When Benny fell onto the ground, Florian said he saw the accused

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stabbing him a few times while Joy punched Benny's back. The deceased succumbed to his injuries. Of the two who had allegedly attacked the deceased, the accused was only arrested by the police two weeks later and a knife was found on his person, while Joy until now, is still at large. The accused was initially charged with the murder of the deceased. After 17 witnesses had been called and examined in court, the charge was amended to include the fact that the accused had committed this murderous act on the deceased with someone (Joy) still at large and that the impugned act was committed with common intention of them both. The accused denied that he caused the injuries on the deceased, and even if the injuries were caused by him, they were not inflicted with intention of causing death of the deceased on the premise that there was sudden fight. At the end of the defence case, the trial judge had found that the prosecution had proved its case beyond reasonable doubt and accordingly, convicted and sentenced the accused to the mandatory death sentence. Before this court, the arguments raised were as follows: (i) that the trial judge had failed to undertake proper maximum evaluation of the evidence before him at the end of the prosecution case; (ii) there was no evidence of common intention that was proven to have existed between the accused and Joy to kill the deceased; (iii) that the trial judge had failed to properly evaluate the evidence of the accused at the end of the defence case; (iv) that the trial judge had failed to make a finding whether the offence was committed in furtherance of the common intention; (v) the trial judge had failed to consider the principles in the case of *Mat v Public Prosecutor* [1963] 1 MLJ 263, when considering the evidence at the end of the defence case; and (vi) the trial judge had erred in not amending the charge from s 302 of the Penal Code to one under s 304(a) of the same Code.

**Held**, allowing the appeal and setting aside the conviction and sentence:

(1) SP18 had testified that he could see everything as there were lights that were emanating from the nearby houses. But 'SP1', an 'independent' witness for the prosecution had testified that the scene of incident was very dark. SP1's description that the night was dark was also supported through the witness of another prosecution witness, namely 'SP4'. There was no judicial appreciation by the learned trial judge on the relevant evidence from SP1 and SP4, which was favourable to the accused person that had come from the prosecution's own witnesses. Compared to the evidence of 'SP18' who was drunk at that time, the evidence of SP1 and SP4 suffered no such infirmity, such that this court ought to be necessarily put on alert (see paras 20–21).

(2) PW18 did not mention in his statement to the police any other name or involvement of Joy apart from naming the accused. But in his oral evidence before the court, PW18 testified that Joy was involved which led to the amendment of the charge to one of common intention. The probability of the truth of the oral evidence was therefore open to

suspicion as in terms of contemporaneity, SP18's recorded statement to the police was nearer to the incident in point of time. The oral testimony in court had come much later. As such, the oral testimony given by SP18 in court during trial, without any documentary back up, would be readily open to question as to its veracity and reliability (see para 22).

(3) SP18 testified that he saw the accused 'menghayun' a shiny object. There was this piece of evidence whereby SP18 told the trial court that SP17 had told him that the accused had a knife on him during the drinking session prior to the incident. But this significant fact was not asked of SP17 when he testified in court. If the intention of the prosecution was to assert the truthfulness of the content of that evidence through SP18 then clearly it must be at best a hearsay (see para 23).

(4) It was established during the cross-examination of SP8 that although the accused had a knife, it was left at home in his bag and that he did not bring it with him on that fateful night. This evidence had completely negated any suggestion that the appellant could be armed with a knife on that night and therefore the evidence of SP18 that he saw the accused 'menghayun' a shiny object must, in all probabilities, be incapable of belief. In the light of SP8's evidence, the inference must be that it was not a knife. Coupled by the fact that no weapon was recovered immediately at the scene of the incident, the reasonable inference in favour of the appellant must be made by the court (see para 23).

(5) The court did not find any finding made by the trial judge that common intention had been established or otherwise. In the light of the amended charge framed against the accused, the trial court ought to have made a finding on the issue of common intention and its failure to do that had amounted to a misdirection occasioning a miscarriage of justice against the accused (see paras 26 & 28).

**[Bahasa Malaysia summary**

Pada hari pembunuhan, Florian Fredoline ('PW18'), tertuduh, dan Topan bin Labala ('Gondrong') ('PW8') telah pergi mencari Oliver Newton Sibatan ('PW17') di rumahnya, tetapi Oliver tiada di rumah, oleh itu mereka berhenti di rumah Dangau @ John bin Mosunggil ('PW7'), jiran Oliver. Keempat-empat mereka kemudiannya meminum 'talak', sebelum Oliver menyertai mereka, sejam kemudian. Pada waktu ini, John telah pulang kerana dia merasa mabuk. Selepas John masuk ke dalam rumahnya, Benny ('si mati') datang dan mereka menyambung minum 'mentakuk'. Joy duduk bersebelahan Benny, apabila tiba-tiba bara rokoknya terkena siku Benny. Dia menjadi marah dan mula menjerit. Joy tiba-tiba berdiri dan menolak muka Benny dan menumbuk kepalanya. Selepas menenangkan Joy, Florian membawa Joy masuk ke rumah John meninggalkan Benny dengan tertuduh. Benny kemudiannya terus bertanya tertuduh soalan-soalan yang membangkitkan

kemarahannya tetapi dia telah ditenangkan oleh Oliver. Pada waktu ini, Oliver mendakwa dan memberitahu SP18 bahawa dia terlihat sebilah pisau di pinggang tertuduh. Apabila sesi minum berakhir lewat malam itu, mereka semua beransur pulang ke rumah. Tidak jauh dari rumah John, Florian dan Oliver mendengar suara Benny menjerit, memanggil Florian dan dia juga menjerit nama tertuduh. Florian kemudian melihat Joy memukul kepala Benny dan tertuduh berhadapan dengan si mati dengan memegang sesuatu yang berkilat dalam genggaman tangannya. Florian berkata bahawa dia juga nampak tertuduh menikam si mati menggunakan senjata berkilat di tangannya. Apabila Benny jatuh ke tanah, Florian berkata dia nampak tertuduh menikam si mati beberapa kali sementara Joy menumbuk belakang Benny. Si mati mati akibat kecederaannya. Tertuduh pada mulanya didakwa atas pembunuhan si mati. Selepas 17 saksi telah dipanggil dan diperiksa di mahkamah, dakwaan telah dipinda untuk memasukkan fakta bahawa tertuduh telah melakukan pembunuhan atas si mati dengan seseorang (Joy) yang masih bebas dan tindakan yang dipersoalkan itu telah dilakukan dengan oleh mereka dengan niat bersama. Tertuduh menafikan bahawa dia telah menyebabkan kecederaan atas si mati, dan jika pun kecederaan itu disebabkan olehnya, ia tidak disengajakan dengan niat untuk menyebabkan kematian kepada si mati pada premis telah berlaku pergaduhan tiba-tiba. Pada akhir kes pembelaan, hakim perbicaraan mendapati bahawa pihak pendakwaan telah membuktikan kes mereka melampaui keraguan munasabah dan sewajarnya, menyabitkan dan menghukum tertuduh dengan hukuman mati mandatori. Di hadapan mahkamah ini, hujah yang dibangkitkan adalah seperti berikut: (i) bahawa hakim perbicaraan gagal untuk mengambil penilaian keterangan maksimum yang betul di hadapannya pada akhir kes pendakwaan; (ii) tiada keterangan niat bersama telah dibuktikan wujud antara tertuduh dan Joy untuk membunuh si mati; (iii) bahawa hakim perbicaraan telah gagal untuk menilai keterangan tertuduh dengan betul di akhir kes pembelaan; (iv) bahawa hakim perbicaraan gaal untuk membuat dapatan sama ada kesalahan telah dilakukan bagi mencapai niat bersama; (v) hakim perbicaraan gagal untuk mempertimbangkan prinsip kes *Mat v Public Prosecutor* [1963] 1 MLJ 263, apabila mempertimbangkan keterangan di akhir kes pembelaan; dan (vi) hakim perbicaraan terkhilaf dalam tidak meminda dakwaan daripada s 302 Kanun Keseksaan kepada satu s 304(a) Kanun yang sama.

**Diputuskan**, membenarkan rayuan dan mengetepikan sabitan dan hukuman:

(1) SP18 telah memberi keterangan bahawa dia dapat melihat segalanya kerana terdapat cahaya yang menerangi dari rumah-rumah yang berdekatan. Tetapi 'SP1', seorang saksi 'independent' bagi pihak pendakwaan telah memberi keterangan bahawa insiden kejadian adalah amat gelap. Deskripsi SP1 bahawa malam itu adalah gelap juga turut disokong oleh kesaksian satu lagi saksi pendakwa, iaitu 'SP4'. Tiada penilaian penghakiman oleh Yang Arif hakim perbicaraan terhadap

keterangan relevan daripada SP1 dan SP4, yang mana berpihak kepada tertuduh yang datang daripada saksi pihak pendakwaan sendiri. Berbanding dengan keterangan 'SP18' yang mabuk pada waktu tersebut, keterangan SP1 dan SP4 tidak mempunyai apa-apa kelemahan, seperti yang sepatutnya diberi perhatian oleh mahkamah (lihat perenggan 20–21).

(2) PW18 tidak menyatakan dalam kenyataannya kepada pihak polis mana-mana nama atau penglibatan Joy selain daripada menamakan tertuduh. Tetapi dalam keterangan lisannya di mahkamah, PW18 memberi keterangan bahawa Joy telah terlibat yang membawa kepada pindaan pertuduhan kepada satu niat bersama. Kebarangkalian kebenaran keterangan lisan oleh itu terbuka kepada syak wasangka seperti dari segi kekinian, kenyataan SP18 yang direkodkan kepada polis adalah lebih hampir kepada kejadian itu pada waktu tersebut. Kesaksian lisan di mahkamah datang kemudian. Oleh yang demikian, testimoni lisan yang diberikan oleh SP18 di mahkamah semasa perbicaraan, tanpa apa-apa dokumen sokongan, akan menjadi mudah terbuka untuk dipersoalkan akan kebenaran dan kebolehpercayaannya (lihat perenggan 22).

(3) SP18 memberi keterangan bahawa dia melihat tertuduh 'menghayun' objek berkilat. Terdapat keterangan yang mana SP18 memberitahu mahkamah perbicaraan bahawa SP17 telah memberitahunya bahawa tertuduh mempunyai sebilah pisau bersamanya semasa sesi minum sebelum kejadian itu. Tetapi fakta penting ini tidak diminta daripada SP17 apabila dia memberi keterangan di mahkamah. Jika niat pihak pendakwaan adalah untuk menegaskan kebenaran kandungan keterangan melalui SP18 maka jelas ia mesti yang terbaik lah keterangan dengar cakap (lihat perenggan 23).

(4) Ia telah dibuktikan semasa soal balas bagi SP8 bahawa walaupun tertuduh mempunyai pisau, ia telah ditinggalkan di rumah di dalam beg dan bahawa dia tidak membawa ia bersamanya pada malam kejadian. Keterangan ini telah benar-benar menafikan apa-apa cadangan bahawa perayu boleh bersenjatakan sebilah pisau pada malam itu dan oleh itu keterangan SP18 bahawa dia melihat tertuduh 'menghayun' objek berkilat hendaklah, dalam semua kebarangkalian, menyebabkan ketidakpercayaan. Dengan mengambil kira keterangan SP8 ini, kesimpulannya ia bukanlah pisau. Ditambah pula dengan kenyataan bahawa tidak ada senjata telah didapati serta-merta di tempat kejadian, inferens munasabah yang memihak kepada perayu hendaklah dibuat oleh mahkamah (lihat perenggan 23).

(5) Mahkamah mendapati tiada dapatan dibuat oleh hakim perbicaraan bahawa niat bersama telah dibuktikan atau sebaliknya. Dengan mengambil kira dakwaan terpinda yang diletakkan terhadap tertuduh,

A mahkamah perbicaraan sepatutnya membuat dapatan atas isu niat bersama dan kegagalannya untuk berbuat demikian telah terjumlah kepada kekhilafan yang menyebabkan salah laksana keadilan terhadap tertuduh (lihat perenggan 26 & 28).]

B **Notes**

For a case on conviction and death sentence, see 4(1) *Mallal's Digest* (4th Ed, 2014 Reissue) para 1575.

**Cases referred to**

C *Gooi Loo Seng v PP* [1993] 2 MLJ 137; [1993] 3 CLJ 1, SC (folld)
*Kumaran a/l Sappani v PP* [2012] 6 MLJ 153; [2011] 3 CLJ 251, FC (refd)
*Mat v PP* [1963] 1 MLJ 263 (refd)
*Nenggani Asmo v PP* [2014] 1 MLJ 501, CA (folld)
D *PP v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393, FC (consd)
*Subramaniam v PP* [1956] 1 MLJ 220, PC (refd)

**Legislation referred to**

Criminal Procedure Code s 180(1)
E Penal Code ss 302, 304(a)

*Hamid bin Ismail (Hamid & Co) for the appellant.*
*Mohd Fairuz bin Johari (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.*

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**Abang Iskandar JCA (delivering judgment of the court):**

BRIEF FACTS OF THE CASE

G **[1]** On 1 May 2008, at about 4pm, Florian Fredoline ('PW18'), Firman bin Fani ('the accused'), and Topan bin Labala ('Gondrong') ('PW8') went to look for Oliver Newton Sibatan ('PW17') at his house, but Oliver was not at home. They then stopped by at Dangau @ John bin Mosunggil's ('PW7') house, Oliver's neighbour. Gondrong then asked permission from John to charge his
H hand phone at his house. John then left them to take bath. When he came out, he found that Gondrong was not with them. John was told that Gondrong went to buy 'talak'. When Gondrong came back, four of them drank 'talak', before Oliver joined them, an hour later. Ten minutes after Oliver came, Joy came by and he also joined them in the drinking session. At this time, John left
I as he felt drunk. After John went inside his house, Benny ('the deceased') came. Benny then gave some money to the accused to buy some 'mentakuk'. All of them continued to drink the 'mentakuk'. Joy was sitting next to Benny, when suddenly his cigarette fire accidently struck on Benny's elbow. Benny was angry and started making noise. Joy suddenly stood up and pushed Benny's face and

punched his head. Joy was calmed down by Florian. Florian then brought Joy inside John's house leaving Benny with the accused. The accused was also known as 'Kilat'.

**[2]** Oliver and Gondrong continued drinking outside the house. The accused was pouring water into their glasses when Benny complained to him on the way he poured the water. The accused just ignored Benny's complaint. Benny then continued asking question to the accused which had made the accused angry, but he was calmed down by Oliver. At this time, Oliver allegedly told 'SP18' that he saw a knife tucked at the accused's waist.

**[3]** When the drinking session had finished, they all proceeded to go home. Florian walked together with Oliver, while Joy walked with the accused. They were not far apart in terms of distance from each other. Meanwhile, Gondrong went back inside John's house to get his hand phone. Benny told Gondrong that the party had left. Benny then told Gondrong that he wanted to go home.

**[4]** Not far after leaving John's house, Florian and Oliver heard Benny shouting. Both of them turned back but they could not see anything as it was dark. They then heard Benny's voice screaming, calling for Florian and he also shouted the accused's name but they just ignored him. At that time, Florian saw the accused was behind them while Joy was walking behind the accused. Florian then stopped and saw the accused going back. Florian followed him. At the same time, Gondrong also heard Benny's voice screaming not far from John's house but he could not see anything as it was dark. Florian then saw Benny holding two bamboo sticks in his hand facing the accused. Although it was dark, Florian said he could see them. Florian then saw Joy came and hit Benny's head. Then he saw the accused facing the deceased and he was holding something shining in his hand. The accused then had stabbed Benny's body by using the shiny weapon in his hand. Florian heard Benny was shouting. When Benny fell onto the ground, Florian said he saw the accused stabbed him a few times while Joy punched Benny's back. After that, both of them had then run away. Florian shouted, calling Oliver for help. Both of them then ran to John's house for help. They then told Jimmy about the incident. Jimmy then called the police. As things had come to pass, Benny had succumbed to his injuries and had since died.

THE ARREST

**[5]** Of the two who had allegedly attacked Benny (the deceased), the accused was only arrested by the police two weeks later, on 15 June 2009 and a knife was found on his person, while Joy until now, is still at large.

THE CHARGE

**[6]** The accused was then charged with the murder of Benny. The charge that was preferred against the accused had read as follows: 'That you, on the 1st day of May 2008, at about 10.00 pm to 10.30 pm, in the vicinity of Kampung Sugud, in the District of Penampang, in the State of Sabah, did commit murder by causing the death of one BENNY BINSOS (NRIC No 690426–12–5363) and you have thereby committed an offence punishable under s 302 of the Penal Code (Act 574) of the Laws of Malaysia'. That charge was marked in court as prosecution exh 'B'. After 17 witnesses had been called and examined in court before the learned trial judge, the charge was amended to include the fact that the accused had committed this murderous act on Benny with someone (Joy) still at large and that the impugned act was committed with common intention of them both. The accused had maintained his plea of not guilty to the amended charge. The amended charge was tendered by the prosecution in the trial court as exhibit marked 'C'.

FINDING OF TRIAL JUDGE AT END OF THE PROSECUTION'S CASE

**[7]** At the end of the prosecution case, the learned trial judge had found that there was a prima facie case established against the accused and he was ordered to enter on his defence to the amended charge of murder under s 302 of the Penal Code.

THE FINDING OF THE TRIAL JUDGE AT END OF THE DEFENCE CASE

**[8]** The accused had elected to give evidence under oath and he was cross-examined by the learned deputy on his testimony in court. At the end of the defence case, the learned trial judge had found that the prosecution had proven its case against the accused beyond reasonable doubt and he had then proceeded to convict him as per the amended charge and had imposed on him the only sentence allowed under the law for such offence, and accordingly, the accused was sentenced to the mandatory death sentence by hanging by the learned trial judge.

THE APPEAL

**[9]** The accused had since filed his notice of appeal against both conviction recorded and death sentence imposed against him. His grievances were listed in the petition of appeal as filed by his learned counsel. The appeal was heard before us and having heard both learned counsel and the learned deputy, we had allowed the accused's appeal and had set aside the conviction and sentence against the accused. We now set-out the reasons for having so decided.

**[10]** Before us, during the course of this appeal, it was submitted by learned counsel for the accused, a number of grounds which according to him would justify our intervention with regard to the conviction entered against the accused. We had heard and considered the learned deputy's responses as well.

## THE ISSUES RAISED DURING COURSE OF APPEAL

**[11]** During the course of submitting before us, learned counsel for the accused had indicated to us that he would proceed along the line that the trial judge had failed to undertake proper maximum evaluation of the evidence before him at the end of the prosecution case. Also, it was contended that there was no evidence of common intention that was proven to have existed between the accused and Joy to kill Benny, the deceased. Learned counsel had also argued that the learned trial judge had failed to properly evaluate the evidence of the accused at the end of the defence case. It was also submitted before us that the learned trial judge had failed to make a finding whether the offence was committed in furtherance of the common intention. It was also complained before us that the learned trial judge had failed to consider the principles in the case of *Mat v Public Prosecutor* [1963] 1 MLJ 263, when considering the evidence at the end of the defence case. Lastly, learned counsel had submitted that the learned trial judge had erred in not amending the charge from s 302 of the Penal Code to one under s 304(a) of the same Code.

**[12]** From our perusal of the evidence, and the decision of the learned trial judge, it is quite clear to our mind that the case for the prosecution had been reliant, substantially, on the evidence of SP18. The fact that the learned trial judge had found that the death of Benny Binsos was proven and that he had died as a result of the injuries sustained by him, was not disputed by the accused. What was disputed by the accused had been that those injuries that were visited upon Benny were not caused by him. It was further argued that even if those injuries were caused by him, they were not inflicted with intention of causing death of the deceased on the premise that there was sudden fight. The requirement in law to prove the necessary intention, to commit murder had been dealt with by the learned trial judge at pp 2–3 of his grounds of judgment (pp 198–199 records of appeal) as follows:

> (4) that in inflicting those injuries upon the deceased, the accused either; (a) caused them with intention of causing death on the deceased; or (b) caused them with the intention of causing bodily injuries on deceased as the accused knew to be likely to cause death; or (c) caused them with the intention of causing bodily injuries on deceased and such bodily injuries intended to be inflicted were sufficient in the ordinary course of nature to cause death; or (d) committed the acts that are imminently dangerous that they must in all probability cause death or such bodily injuries as are likely to cause death.

Much reliance, and rightly so, was placed by the learned trial judge, on the evidence of the pathologist Dr Jessie Hiu ('SP12') in coming to the conclusion that the cause of death was stab wounds on the neck and chest which caused massive bleeding, thereby leading to severe loss of blood, which in turn had caused hypovolemic shock and collapse of lung leading to difficulty in breathing. It was the testimony of the pathologist as well that, the wounds that she had examined during the post-mortem would be sufficient in the ordinary course of nature to cause death. Indeed, in her opinion, the wounds suffered by the deceased were fatal in nature. We are of the view that such finding by the learned trial judge in that the deceased had died due to the injuries that were visited upon him, was correctly arrived at.

**[13]** However, having said that, the issue of who had caused those fatal injuries on the deceased had taken a centre stage in this case. The answer to that question must be derived from the factual circumstances obtaining in this case as could be deduced from the evidence as led before the learned trial judge.

**[14]** Indeed the learned trial judge had recognised that from the evidence before him, the evidence coming from the testimony of SP18 was the key to unlock that very issue. He had aptly postulated the prosecution's contention in his judgment at p 6 to be as follows:

> The prosecution relied on the eyewitness account given by PW18 who testified that the accused had stabbed the deceased with a shiny object although the murder weapon could not be identified by PW18.

**[15]** In his written submissions filed in this court for our consideration, the learned deputy had said, at p 11 therein, as follows:

> It is submitted that although the weapon used by the accused was not identified by PW18, however PW12's evidence corroborates PW18's evidence and affirmed that the cause of death of the deceased is due to stab wounds and the most important piece of evidence came from an eye witness, PW18.

**[16]** The learned trial judge had then considered the evidence of SP18 in the light of the defence's submissions placed against the prosecution's case. In all, he had identified nine points that were raised by the defence against the evidence of SP18 in order to show that the evidence of SP18 was unreliable to be used as a basis to even call for the accused, to enter on his defence to the amended charge of the murder of Benny in furtherance of the common intention of the accused and someone still at large (Joy). Pages 202–203 of the records of appeal evidence these points in the learned judge's grounds of decision. In our view, it is pertinent to outline those nine points raised by the defence in challenging the veracity and reliability of SP18's evidence. Those nine points are as follows:

(a) PW18 did not see the accused possessing a shiny weapon while they were at PW7's house;

(b) PW18's account that he saw the accused had a shiny object in his hand was based on PW17's information to him;

(c) PW17 did not testify in court that he told PW18 about the weapon that the accused had, hence PW18's evidence was not corroborated by PW17's evidence;

(d) PW18 was under influence of alcohol;

(e) the knife (exh P2) that was seized from the accused by PW2 had nothing to do with this case;

(f) the crime scene was dark at the material time, hence rendered PW18's evidence 'illogical';

(g) PW18's evidence in court was inconsistent with his statements to the police;

(h) PW18's evidence in court about the incident was inconsistent with the police report attached to exh P44 and also PW19; and

(i) PW18's evidence in court was inconsistent with what he had told PW6, PW7 and PW17 immediately after the incident. PW18 did not mention that Joy was involved in the fight.

**[17]** The learned trial judge had not addressed those nine issues individually but instead had addressed them globally. In the context of this case, we see nothing amiss in his approach. Needless to say, his conclusion had been adverse to the accused, especially in his finding that SP18 had been a truthful and credible witness.

**[18]** We had perused through the evidence in the records of appeal and having done that, we are of the like view that the learned trial judge was correct that the prosecution's case depended very much, if not entirely on the evidence of SP18. The thrust of the learned trial judge was therefore to ascertain whether this witness' evidence had been credible. And then there is another consideration namely, whether his evidence would be sufficient, upon maximum evaluation, and taken together with the entire of the prosecution's evidence, to amount to a prima facie case in order to justify calling the accused to enter on his defence to the amended charge for murder, in furtherance of a common intention with a person still at large.

**[19]** In a nutshell, the so called damning evidence against the accused has been the evidence of SP18 who had testified that he had seen the accused 'menghayun' a shining object towards Benny, the deceased. Then he had heard

Benny screaming. This was the eyewitness whose evidence that the prosecution had relied on to found a conviction against the accused for murder. We noted that this evidence was the subject of some strenuous challenge that was mounted by learned defence counsel. One of the grounds of challenge had been the admitted fact that SP18 was drunk at that time. The fact that there had been a drinking session involving all of the parties concerned with this case was also an undisputed fact. The learned trial judge was aware of this fact, but he had relied on the Federal Court case of *Kumaran a/l Sappani v Public Prosecutor* [2012] 6 MLJ 153; [2011] 3 CLJ 251 ('the *Kumaran*'s case') which had affirmed the decision of the Court of Appeal that had earlier affirmed the finding of fact by the trial judge on the state of intoxication of the witness SP12 in that case. Having considered the surrounding circumstances in that case, in relation to the state of intoxication of SP12, the trial judge had concluded that SP12 was at the material time still able to control himself and was aware of what had happened surrounding him. Premised on that finding of fact, the trial judge had ruled that SP12 was a truthful witness.

**[20]** We have no issue with that ruling in the *Kumaran*'s case, but we must add rather quickly that the basis of such ruling is essentially fact driven. In this case, we noted that the evidence of SP18 on the state of darkness that night was not the only evidence before the learned trial judge. In fact, there was the evidence of SP1, a police officer who had come to the scene shortly after the occurrence of the fatal incident. The SP18 had testified that he could see everything because there were lights that had emanated from the nearby houses. But SP1, an 'independent' witness for the prosecution had testified that the scene of incident was very dark. Indeed, he had agreed when put to him by learned counsel during cross-examination to describe that night that, the night was 'sangat gelap'. SP1 was the police photographer on duty that night and it was his evidence during cross-examination that:

> Selepas itu unit forensik dari IPK Kepayan datang, dia membawa satu lampu dan generator.

The re-examination by the learned deputy was whether if SP1 had stood next to the corpse he would be able to see clearly, to which SP1 had agreed. But when SP18 said that he saw the accused 'menghayun' shiny object towards Benny, SP18 was definitely not standing next to Benny. The photographs marked '1' and '2' produced by the prosecution had shown that external light had to be used in order to lighten up the place where the body of Benny was seen on the ground. There was no evidence coming from SP1 that there were lights coming from nearby houses. In fact it was not established through SP1's examination by the prosecution that there were houses in the vicinity of the scene of crime, bearing in mind the material evidence of SP18 that was in the possession of the prosecution at all times. We noted that the learned trial judge did not address his mind to this evidence at all. 'SP1' was Lans Koperal Wan Haszemi bin Wan Jaffar. His description that the night was dark was also

supported through the witness of another prosecution witness, namely SP4. He was Lans Koperal Suat bin Atung. He was also a police detective who was asked to take photographs at the scene of incident. When asked by the learned deputy as to the condition that night, 'SP4' said, 'Pada masa itu gelap'. When he was cross-examined by learned counsel whether there were houses nearby, SP4 answered thus: 'Saya tak berapa nampak pasal gelap'. In re-examination, when he was asked how he could have taken those photographs if it was dark, SP4 answered that he had the advantage of using the forensic light.

**[21]** In his decision, we noted that there was no judicial appreciation by the learned trial judge on the relevant evidence from SP1 and SP4, which was favorable to the accused person that had come from the prosecution's own witnesses. To our mind, the value of this evidence lies in its intrinsic capacity to challenge the veracity of SP18's evidence on the state of darkness that night. In the scheme of things obtaining in this case, the evidence from SP1 and SP4 must be viewed as crucial and critical. This court finds no reason to doubt the evidence of SP1 and SP4. Compared to the evidence of SP18 who was drunk at that time, the evidence of SP1 and SP4 suffered no such infirmity, such that this court ought to be necessarily put on alert. The same cannot, in all fairness be said of the evidence of SP18. The evidence of SP12 in the *Kumaran*'s case was not subject to scrutiny in the same manner as that of SP18's evidence because there was no other evidence coming from another witness in the *Kumaran*'s case that had the effect of contradicting his evidence with material particular. There is therefore, inconsistency in the prosecution evidence itself as to how much light was at the scene of the crime among the prosecution witnesses. In this regard, the testimony of 'PW1' and 'PW4' (police witnesses) were not given due consideration by the trial judge.

**[22]** This court also noted that PW18 did not mention in his statement to the police any other name or involvement of Joy (the other accused who is still at large) apart from naming the accused. But in his oral evidence before the court, PW18 testified that Joy was involved which led to the amendment of the charge to one common intention. The probability of the truth of the oral evidence is therefore open to suspect as in terms of contemporaneity, SP18's recorded statement to the police was nearer to the incident in point of time. The oral testimony in court had come much later. As such, the oral testimony given by SP18 in court during trial, without any documentary backup, would be readily open to question as to its veracity and reliability.

**[23]** That, however is not the only weakness that we noted in the evidence of SP18 so as to render it rather suspicious and unsafe to be acted upon in the manner in which the learned trial judge, with respect, had done. In fact, there is another aspect of the SP18's evidence which is not totally satisfactory to say the least. It is this. It concerns the issue with regard to the weapon that was used.

The matter regarding the weapon came about when the SP18 testified that he saw the accused 'menghayun' a shiny object towards Benny as a result of which he said he heard Benny screaming and then he said he saw Benny fell. It must be recalled that there was this piece of evidence whereby SP18 told the trial court that SP17 had told him that the accused had a knife on him during the drinking session prior to the incident. But this significant fact was not asked of SP17 when he testified in court. So what was to be made of that shiny object that SP18 said that he had seen the accused 'menghayun' towards Benny. Was it to be inferred that it was the knife that SP18 had been told about by SP17? If the intention of the prosecution was to assert the truthfulness of the content of that evidence through SP18 then clearly it must at best a hearsay. The case of *Subramaniam v Public Prosecutor* [1956] 1 MLJ 220 has made that as trite law. In any event, there was the evidence of SP8 who had specifically addressed this issue about whether the accused had with him the knife on that fateful night. It was addressed during SP8's cross-examination by learned counsel, like so:

> PUT: Kilat (the other name of the accused) tiada mempunyai pisau kecil yang kamu sebut tadi pada malam itu.
>
> A: Setuju.
>
> (Line 5–10 of records of appeal).

It was established during cross-examination of SP8 that although the accused had a knife, it was left at home in his bag and that he did not bring it with him on that fateful night. The complaint by the appellant before us had been that the learned trial judge did not consider this part of SP8's evidence. This evidence had completely negated any suggestion that the appellant could be armed with a knife on that night and therefore the evidence of SP18 saying that he said he saw the appellant 'menghayun' a shiny object must, in all probabilities, be incapable of belief. What else could the inference be that the prosecution have wanted the trial court to conclude if not the fact that it was the knife that the SP17 had told SP18 that the appellant had with him that night. In the light of SP8's evidence, the inference must be that it was not a knife. Coupled by the fact that no weapon was recovered immediately at the scene of the incident, the reasonable inference in favour of the appellant must be made by the court. That is trite. It did not escape our notice too that the knife that was subsequently recovered from the appellant when he was arrested quite some time after the incident was not shown to SP18 by the prosecution. Quite clearly SP18 could not have seen it before on the person of the appellant on that night.

**[24]** We were aware that as an appellate court, we should be slow to interfere with findings of fact made by the trial court. The rationale for that principle has been premised on the consideration that the trial court has the audio-visual advantage of listening to and observing the demeanour of the witnesses before it, which benefit the appeal court does not similarly possess. However, like all

general rules, it is not without exception. In this case, as could be seen above, the findings made by the learned trial judge could not be supported by the evidence before him. That had, with respect, warranted our interference with his findings of facts.

**[25]** Looking at the evidence produced by the prosecution, this court was of the view that it had not surmounted the required threshold in establishing a prima facie case as envisaged under s 180(1) of the Criminal Procedure Code against the appellant. In the case of *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393 the Federal Court had stated that the strength of the prosecution's evidence at the end of its case, after it has been subject to the maximum evaluation by the court, must be such that it is at such a level that if the accused chooses to remain silent the court must be able to convict him. Only if the court is satisfied that such threshold has been achieved by the prosecution's case that it is justified to call the accused to enter on his defence to the charge that is preferred against him. Anything short of that will not suffice. Indeed in the *Mohd Radzi*'s case it was reiterated by the apex court that this exercise of maximum evaluation by the trial court must of necessity 'involve an assessment of the credibility of the witnesses called by the prosecution and the drawing of inferences admitted by the prosecution evidence. Thus, if the prosecution's evidence admits of two or more inferences, one which is in the accused's favour, then it is the duty of the court to draw the inference that is favourable to the accused'. Considered in that light, we were of the view that the prosecution's evidence in this appeal, had fallen short of achieving the required threshold to establish a prima facie case against the appellant.

**[26]** As regards the issue on common intention, having perused the grounds of judgment, this court did not find any finding made by the learned trial judge that common intention had been established or otherwise. Although it is trite law that common intention may be formed at the spot when the crime was about to be committed, that legal postulation must be applied with caution and to our mind, any conclusion as to the fact to be arrived at, must be driven and guided by the set of facts that exists before the court adduced by way of evidence. In his grounds of decision, this is how the learned trial judge had dealt with this issue of common intention and it resides at p 210 of the records of appeal:

> Issue on Common Intention: The Counsel submitted that by amending the charge after the testimony of PW17, an adverse inference must be invoked against the Prosecution for its conduct in amending the charge. As I have accepted the evidence of PW18, this contention is without merit.

Having looked at the overall appeal record, in particular, the grounds of judgment, the learned trial judge did not consider the defence evidence on this element of common intention. The evidence of the appellant on this matter

appeared as follows:

Q: Sepanjang kau di rumah itu, ada atau tidak kau berbincang dengan Joy mahu pukul Benny?

A: Tiada.

Q: Ada atau tidak kamu dua orang bincang atau rancang mahu bunuh Benny selepas balik dari rumah itu?

A: Tidak.

**[27]** We agreed with learned counsel that the learned trial judge did not consider this part of the appellant's evidence in his grounds of decision. Common intention once pleaded in the charge, becomes an element that needed to be established against the accused person(s) and must therefore be addressed by the trial court at the end of the whole case in ascertaining whether that element had been established or otherwise. The duty on the trial court to consider all aspects of the defence evidence in answer to the charge preferred against him is well established by a long line of authorities. We would cite a few cases that support that legal proposition. In the Court of Appeal case of *Nenggani Asmo v Public Prosecutor* [2014] 1 MLJ 501, the learned Justice Azahar Mohamed JCA, delivering the court's decision had said in para 30 of the judgment, as follows:

> It is the duty of the court to consider the defence of an accused person, no matter how weak or unreasonable the defence story may be. It is a serious misdirection by way of non-direction, which would occasion a failure of justice, warranting appellate interference, if the trial court failed to judicially consider the defence.

Indeed, this principle is not a novel principle of recent origin, in fact, in 1993, the then Supreme Court in the case of *Gooi Loo Seng v Public Prosecutor* [1993] 2 MLJ 137; [1993] 3 CLJ 1 through the judgment of the learned Justice Edgar Joseph Jr had occasion to say the following:

> Clearly, therefore, the trial judge, was bound to, but did not view the whole of the evidence objectively and from all angles, with the result that the appellant had lost the chance which was open to him to be acquitted. On this point, we consider the non-direction amounts to misdirection ...

**[28]** From a perusal of the grounds of decision of the learned trial judge, we were with learned counsel that there was merit in his complaint regarding the issue of common intention. In the light of the amended charge framed against the appellant, the trial court ought to have made a finding on the issue of common intention and its failure to do that had amounted to a misdirection occasioning a miscarriage of justice against the appellant.

FINDING OF THIS COURT

**[29]** Premised on the above, this court agreed with learned counsel for the appellant that there were infirmities of a serious nature surrounding the decision by the trial judge which, in our view, had warranted our curial intervention. In the upshot, this court had found that the conviction was not safe to be affirmed. In the result, the appeal filed by the appellant, Firman bin Fani was allowed by us. Accordingly, we set aside the conviction and sentence of the High Court dated 13 September 2011 and we had acquitted and discharged the appellant from the amended charge under s 302 of the Penal Code.

*Appeal allowed and conviction and sentence set aside.*

Reported by Ashgar Ali Ali Mohamed